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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1086~~. ~~727~~ 426 128

CHARLES E. WHITEHEAD, TRUSTEE OF THE DES MOINES AND FORT DODGE RAILROAD COMPANY, APPELLANT,

vs.

E. E. SHATTUCK AND PETER JENSEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED OCTOBER 1, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1086.

CHARLES E. WHITEHEAD, TRUSTEE OF THE DES MOINES AND FORT DODGE RAILROAD COMPANY, APPELLANT,

vs.

E. E. SHATTUCK AND PETER JENSEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Exhibit A—Abstract of title	7	3
Subpœna	8	4
Marshal's return	9	4
Demurrer	10	5
Notice for hearing on demurrer	13	6
Præcipe for appearance	14	7
Amended and substituted bill	15	7
Submission of demurrer	16	9
Order sustaining demurrer	17	10
Order taking demurrer under advisement	18	10
Decree	19	10
Bond	20	10
Citation and proof of service of same	22	11
Clerk's certificate	23	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 1, 1887.

1 Pleas in the circuit court of the United States for the northern district of Iowa, central division, and return thereof, begun and holden at the city of Fort Dodge, in said district, on the 21st day of June, A. D. 1887, before the Hon. O. P. Shiras, judge of said court.

2 *Bill in Equity.*

In the Circuit Court of the United States for the Northern District of Iowa, Central Division. June Term, 1883.

CHAS. E. WHITEHEAD, Trustee of the Des Moines & Fort Dodge Railroad Company, Complainant,

vs.

PETER JENSEN and E. E. SHATTUCK, Respondents.

To the judges of the circuit court of the United States for the northern district of Iowa, central division:

Charles E. Whitehead, of the city of New York and a citizen of the State of New York, trustee of the Des Moines & Fort Dodge Railroad Company, a corporation duly organized and doing business under the laws of the State of Iowa, brings this his bill against Peter Jensen, a resident and citizen of the State of Iowa, and E. E. Shattuck (or Elem Shattuck, being the same person), citizen of the State of California.

1. And thereupon your orator complains and says that he is the owner in fee simple and has the title thereto in his own name, but as trustee as aforesaid, to the following-described real property, situate in the county of Humboldt, in the State of Iowa, viz.: Lots 1, 2, 3 and the northwest ¼ of the southeast ¼ of sec. 27, t'p 92
3 N., of range 29 west, of the 5th P. M., Iowa, of the value of $5,000.

2. Your orator further says that he has attached hereto an abstract showing the source from which his title is derived and his chain of title to said property, which abstract is marked Exhibit "A" and made a part of his bill of complaint.

3. Your orator further says that, notwithstanding he is the owner in fee simple of said property, as trustee as aforesaid, and is entitled to the immediate possession and enjoyment of said property, that the respondent- herein claim title to said property, as your orator is informed and believes and so charges the fact to be, and — in possession of the same, and holds the same notoriously, openly, and adversely to your orator, and, as your orator is informed and believes, makes the following claim to title and right of possession, viz: That the said E. E. or Elem Shattuck, in 1864 or thereabouts, made a homestead entry upon said land and procured a certificate of entry—the final certificate about the year 1871—and holds title thereto from the United States under such entry, and has since purchased the same of the Iowa Homestead Company, which company claims title through the grant of Congress made to Iowa in May, 1856, known as the Dubuque & Sioux City railroad grant, and the
4 said Jensen holds possession and claims under the said Shat-

tuck, but whether as purchaser or tenant or by what claim of right is unknown to complainant, but your orator, from information and belief, alleges and charges that said claim and pretended title is without foundation in law or equity — is made in fraud of the right of your orator; that the evidence of title, to wit, said certificate of entry & said Iowa Homestead Co. conveyance, held to support such title in respondent-, are fraudulent and void and were procured without legal right and in violation of law, but that the same are clouds upon your orator's title.

4. Your orator further charges that all the doings and pretences of respondent- are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises.

5. In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, and to the end that said respondents may, if they can, show why your orator should not have the relief herein prayed, and may, upon their corporal oath and according to the best and utmost of their ability, knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such matters herein as are charged against respondent-, and particularly may show
5 wherein and by virtue of what authority respondent- claim title and seek to hold said property from your orator and show in what said pretended title consists and how the same was acquired and the evidences of such pretended title—

And your orator prays your honor to annul and cancel such pretended evidence, to wit, such entry & certificate of entry & conveyance through & under the same, and such pretended title through said Iowa Homestead Company and all conveyances under the same as the same may be made — appear under the evidences of title of respondents, and remove the said clouds upon your orator's title to said property from the same, and clear the same from all cloud by reason of any claim of title made by respondents, and to establish and quiet the title in complainant (held in trust as aforesaid), and that he may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet.

And may it please your honors to grant unto your orator a writ of subpena of the United States of America, issuing out of and under the seal of this honorable court, directed to said respondent-, commanding them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand
6 to, perform, and abide such further order, direction, and decree as may be made against them.

And your orator, as in duty bound, will ever pray, etc.

J. F. DUNCOMBE,
Solicitor for Complainant.

A. E. CLARK, *Of Counsel.*

[Endorsed:] Bill in equity. Filed May 3, 1883. A. J. Van Duzee, clerk; W. H. Johnston, deputy.

Grantor.	Grantee.	Date of instrument.	Date of filing.	Character of inst.	Book.	Page.	Description and remarks.
United States	Territory of Iowa	Aug. 8, 1846		Grant			Act Congress Aug. 8, '46; all wild sections within 5 miles of the Des Moines river.
State of Iowa	Keokuk, Ft. Des Moines & Minnesota R. R. Co.	M'ch 22, 1858		Grant			Act 7th General Assembly, Iowa, granting above-described lands to the Improvement Co.
United States	State of Iowa	M'ch 2, 1861		Joint resolution.			Relinquishing to the State the lands erroneously certified under the above acts.
United States	State of Iowa	July 12, 1862		Grant			Act of Congress, July 12, 1862, extending grant of Aug. 8, '46, to north line of the State.
State of Iowa	Keokuk, Ft. Des Moines & Minnesota R. R. Co.	M'ch 28, 1864		Grant			Act 10th General Assembly, Iowa, supplemental to act of M'ch 22, 1858.
State of Iowa	Des Moines Valley R. R. Co.	M'ch 13, 1868		Grant			Act of 12 General Assembly, Iowa, conferring right of old Co. in D. V. R. R. Co.
C. F. Gullixson, sheriff Humboldt Co.	Chas. E. Whitehead	May 14, 1881	May 16, 1881	Sheriff deed	22	462	Lots 1, 2, & 3 & N. W. of S. E., in pursuance with foreclosure of mortgage 1, below.
D. V. R. R. Co., Geo. B. Smyth, V. P., T. C. M. Paton, trustee.	Chas. E. Whitehead, trustee.	Feb. 20, 1877	M'ch 3, 1877	Trust deed	14	384	Lots 1, 2, & 3, 27–92–29; Paton releases and quitclaims all his interest acquired through deed of trust below.
D. V. R. R. Co., Geo. B. Smyth, P. P., & T. M. C. Payton, trustee.	Chas. E. Whitehead, trustee.	Aug. 21, 1877	Jan'y 21, 1878	Trust d.	14	559	N. W. ¼ of S. E. ¼, 27–92–29; same note as above.
D. V. R. R. Co., by David W. Kilbourne, pres., & A. Bridgway, s'c'y.	W. S. Gilmore & N. A. Cowdry, trustees.	Oct. 1, 1868	Oct. 26, 1868	Trust deed & mortgage.	M. A.	599	Lots 1, 2, & 3 & N. W. ¼ of S. E. ¼; to secure construction bonds.

8 *Subpœna in Chancery.*

UNITED STATES OF AMERICA, }
Northern District of Iowa, Central Division, } *ss:*

The President of the United States to Peter Jensen & E. E. Shattuck:

We command you and each of you that you appear before the judge of the circuit court of the United States for the northern district of Iowa, at Ft. Dodge, on the first Monday of July, it being the 2nd day of July next (A. D. 1883), to answer to the bill of complaint of Charles E. Whitehead, trustee of the Des Moines & Fort Dodge Railroad Company, this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of such judgment being pronounced you by default.

To the marshal of the northern district of Iowa.

Returnable to the July rule day, it being Monday, the 2d day of July, A. D. 1883.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the U. S., at Ft. Dodge, this the 24th day of May, A. D. 1883, and of the Independence the 107 year.

[SEAL.] A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa,
By W. H. JOHNSTON, *Deputy.*

MEMORANDUM.—The within-named defendant is notified that unless he enters his appearance in the clerk's office of said court at Ft. Dodge aforesaid on or before the day to which the above writ is returnable as above stated the complaint will be taken against him as confessed and a decree entered thereon accordingly.

[SEAL.] A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa,
By W. H. JOHNSTON, *Deputy.*

9 NORTHERN DISTRICT OF IOWA, *ss:*

—— ——, of ——, is hereby appointed special deputy U. S. marshal to serve this writ.

——— ———,
U. S. Marshal for the Northern District of Iowa.

This writ came into my hands for service on the 30th day of May, A. D. 1883, and I served the same on the within-named Peter Jensen & on E. E. Shattuck by service on B. H. Harkness, attorney-in-fact for said Shattuck, on the first *1st* day of June, 1883, by reading the same to each and by delivering a true copy of the same to each of them personally in the county of Humboldt and State of Iowa.

GEO. D. PERKINS,
U. S. Marshal.
A. BEACH, *Deputy.*

Marshal's fees:

Mileage, 21 miles	$1 26
Service on two	4 00
Copy, two	2 00
	$7 25

[Endorsed:] No. —. Subpœna in chancery. Circuit court of the United States, northern district of Iowa. Chas. E. Whitehead, trustee, *vs.* Peter Jensen, E. E. Shattuck. Returnable to rule day, first Monday in July, A. D. 1883. A. J. Van Duzee, clerk, by W. H. Johnston, dep't. Filed Jan'y 12, A. D. 1883. A. J. Van Duzee, clerk, by W. H. Johnston, dep't. —— ——, comp't's sol.

10 In the Circuit Court of the United States, Northern District of Iowa, Central Div.

CHARLES E. WHITEHEAD, Trustee, Complainant,

vs.

E. E. SHATTUCK.

The demurrer of E. E. Shattuck, respondent, to the bill of complaint of Charles E. Whitehead, trustee, &c., the above-named complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows—

That the said bill does not contain any matter of equity whereon this court can grant any decree or give the plaintiff relief against this defendant.

And this defendant further demurs to said bill for that it appears by said bill that it is necessary that the Des Moines and Fort Dodge Railroad Company in said bill named should be a party to this suit, in this, that the complainant shows by his said bill that he is the trustee of the said Des Moines & Ft. Dodge Railroad Co., and hath not shown or set forth in or by his said bill that he is such trustee as may maintain this suit without the presence of his beneficiary as a party.

11 And this defendant further demurs to said bill of complaint because the complainant hath not shown or set forth therein that he has title to or any interest in the real estate therein described, in this:

It affirmatively appears from said bill and the exhibit annexed thereto that the complainant claims title under the act of Congress of July 12th, 1862, and August 8th, 1846, granting all odd-numbered sections within five miles of the Des Moines river, and it does not appear in or by said bill that said real estate is within the limit of said grant or subject thereto or within five miles of the said Des Moines river.

And this defendant further demurs to said bill of complaint because it appears therefrom that the complainant has a plain, speedy, and adequate remedy at law by bringing ejectment to recover possession of the real estate described in said bill, and no ground of equitable relief is shown or set forth in or by said bill.

Wherefore and for divers other good causes of demurrer appearing in said bill this defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HUBBARD, CLARK & DAWLEY,
G. H. SHELLENBERGER,
Sol't's for Def't.

12 I certify that, in my opinion, the foregoing demurrer is well founded in point of law.

CHAS. A. CLARK,
Of Counsel for Defendant.

UNITED STATES OF AMERICA, } ss:
State of Iowa, Humboldt County, }

I, B. H. Harkness, being duly sworn, depose and say that I am att'y-in-fact for the defendant in the foregoing suit, and that the above and foregoing demurrer is not interposed for delay.

E. E. SHATTUCK,
By B. H. HARKNESS, *Attorney.*

Subscribed to and sworn to before me this 1st day of August 1883.

[SEAL.]

G. H. SHELLENBERGER,
Notary Public, Humboldt Co., Iowa.

[Endorsed:] Filed Aug. 6, 1883. A. J. Van Duzee, clerk, by W. H. Johnston, deputy.

13 Clerk of the United States circuit court, northern district, central division:

You will please take notice that the case of Whitehead, trustee, *vs* Shattuck *et al.*, No 31, equity, will be set down for trial at the next January term of this court on demurrer.

Aug. 12th, 1884.

J. F. DUNCOMBE,
Sol. for Compl.

[Endorsed:] Filed Aug. 12, 1883. A. J. Van Duzee, cl'k, by W. H. Johnston, deputy.

14 *Præcipe for Appearance.*

In United States Circuit Court, Northern District of Iowa.

CHAS. E. WHITEHEAD, Trustee, Plaintiff,
vs.
E. E. SHATTUCK, Defendant. } No. 31.

The clerk of said court will please enter our appearance for defendant in above cause.

HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

[Endorsed:] Filed July 2, 1883. A. J. Van Duzee, clerk, by W. H. Johnston, dep-ty.

15 *Amended and Substituted Bill in Equity.*

In the Circuit Court of the United States for the Northern District of Iowa, Central Division. June Term, 1886.

CHARLES E. WHITEHEAD, Trustee of the Des Moines & Fort Dodge Railroad Company, Complainant,
vs.
PETER JENSEN & E. E. SHATTUCK, Respondent.

To the judges of the circuit court of the United States for the northern district of Iowa, central division:

Charles E. Whitehead, of the city of New York and a citizen of the State of New York, trustee of the Des Moines & Fort Dodge Railroad Company, by leave of court first had, files this his amended and substituted bill of complaint against Peter Jensen & E. E. Shattuck, citizens of the State of Iowa.

1. And thereupon your orator complains and says that he is the owner in fee simple and has the title thereto in his own name (subject to the claims of title of respondent), but as trustee as aforesaid, to the following-described real property, of the value of five thousand five hundred dollars, situate in the county of Humboldt, in the State of Iowa, viz:

Lots 1, 2, 3 and the northwest ¼ of the southeast ¼ of section 27, township 92 north, of range 29 west, of the 5th P. M., Iowa.

2. Your orator further says that he has attached to his original bill of complaint filed herein an abstract showing the source from which his title is derived and his chain of title to said property, which abstract is marked Exhibit "A" and made a part of this amended and substituted bill of complaint.

3. Your orator further says that, notwithstanding he is the owner in fee simple of said property as trustee as aforesaid and is entitled to the immediate possession and enjoyment of said property, that the respondent herein claims title to said property, as your orator is informed and believes and so charges the fact to be, and is in pos-

session of the same, and holds the same notoriously, openly, and adversely to your orator, and, as your orator is informed and believes and so charges, makes the following claim to title and right of possession, viz:

a. Under a pre-emption and homestead claim and entry under said claim in the United States Land Office.

b. Under a certificate of entry of said land given by the United States Land Office, which by the laws of the State of Iowa is made evidence of title.

c. Under a patent issued by the Land Department of the United States made upon said land as Government lands subject to entry.

d. Under a deed of the Iowa Homestead Co., the grantee of the Dubuque & Sioux City R. R. Co., which company claimed title from the act of Congress entitled "An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," and a certificate of the proper officer of the Land Department of the United States setting apart said lands to said company as a portion of said grant.

But your orator, from information and belief, alleges and charges that said claims of title and pretended title *is* without foundation in law or equity, *is* made in fraud of the rights of your orator; that the said pre-emption and homestead claim and entry under said claim are fraudulently made and void, for the reason that said land was not subject to pre-emption or homestead or entry under said claim when the same was made, and never has been so subject to pre-emption, homestead, or entry thereunder.

That said certificate of entry, given as aforesaid, was fraudulently made and given, for the reason that said land was not at the time and never has been subject to entry as Government land.

That the patent issued as aforesaid by the Land Department of the United States, made as aforesaid, was fraudulently made and delivered, said land at the time of said entry not being Government land and not being subject to entry.

That the said deed from the Iowa Homestead Co. conveyed no title, for the reason that said land was no part of said grant of 1856.

That all of said several claims and evidences of title are fraudulent and void and were procured without legal right and in violation of law, but that the same are clouds upon your orator's title and interfere with and prevent the sale of said property by your orator.

4. Your orator further charges that all the doings and pretences of respondent are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises.

5. In consideration whereof and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, and to the end that said respondent may, if he can, show why your orator should not have the relief herein prayed, and may, upon his corporal oath and according to the best and utmost of his ability, knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such matters herein as are charged

against respondent, and particularly may show wherein and by virtue of what authority respondent claims title and seeks to hold said property from your orator, and show in what said pretended title consists and how the same was acquired, and the evidences of such pretended title—

And your orator prays your honors to annul and cancel such pretended evidences of title, to wit:

The said pre-emption and homestead claim and entry, the said certificate of entry, the said patent of said land, the said certificate of said land as a part of said railroad grant of 1856, and the deeds and certificates under the same, and each and every of said above-stated evidences of title under which respondent claims title and under which he claims the rights to occupy and hold said land, and to remove the said clouds upon your orator's title to said property from the same and clear the same from all cloud by reason of any claim of title made by respondent and said evidences of title, and to establish and quiet the title in complainant (held in trust as aforesaid); and that he may have such other and further relief in the premises as the nature of the circumstances in this case may require and to this honorable court may seem meet.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America issuing out of and under the seal of this honorable court, directed to said respondent, commanding him, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand to, perform, and abide such further order, direction, and decree as may be made against him.

And your orator, as in duty bound, will ever pray, etc.

J. F. DUNCOMBE,
Solicitor for Complainant.

A. E. CLARK, *Of Counsel.*

[Endorsed:] Filed Dec. 6, 1886. A. J. Van Duzee, clerk, by W. H. Johnston, deputy.

16 United States Circuit Court, Northern District of Iowa, Central Division. January Term, 1886.

CHAS. E. WHITEHEAD, Trustee, *vs.* PETER JENSEN & E. E. SHATTUCK. } Equity No. 31.

JANUARY 19, 1886—2nd day of term.

And now, on this day, this cause coming on, J. F. Duncombe, Esq., appearing for the plaintiff, and no one in person appearing for the defendant, the demurrer heretofore filed herein is submitted to the court.

17 United States Circuit Court, Northern District of Iowa, Central Division. June Term, A. D. 1886.

CHAS. E. WHITEHEAD, Trustee,
vs.
PETER JENSEN & E. E. SHATTUCK. } Equity No. 31.

And now, on this 24th day of June, A. D. 1886, the same being the 9th day of the term, this cause coming up for hearing on the demurrer to the complainant's bill of complaint heretofore filed and submitted herein, and the court, being now fully advised in the premises and having filed his written report herein, sustains the demurrer, whereupon the complainant in open court asks for leave to amend his bill, which is granted.

18 United States Circuit Court, Northern District of Iowa, Central Division. January Term, A. D. 1887.

CHAS. E. WHITEHEAD, Trustee,
vs.
PETER JENSEN & E. E. SHATTUCK. } Equity No. 31.

WEDNESDAY, *January* 26, 1887—6th day.

And now, on this day, this cause coming before the court on the demurrer to complainant's amended bill of complaint filed herein, leave of court having first been obtained for filing the same, thereupon the demurrer is submitted to the court, and the court takes the same under advisement.

19 United States Circuit Court, Northern District of Iowa, Central Division. June Term, 1887.

CHAS. E. WHITEHEAD, Trustee,
vs.
PETER JENSEN & E. E. SHATTUCK. } Equity No. 31.

An- now, on this 21st day of June, A. D. 1887, the same being the first day of the June, 1887, term of this court, this cause coming on to be heard on the demurrer to complainant's amended bill of complaint heretofore filed and submitted to the court herein, and the court, being now fully advised in the premises, sustains the demurrer.

It is therefore ordered and adjudged by the court that complainant'-bill of complaint be dismissed at complainant's cost, taxed at $34.66, on the ground that the same should have been brought at law, and not in equity. And the complainant herein praying in open court for an appeal in said cause to the Supreme Court of the United States the same is allowed; the complainant to file proper security in the sum five hundred dollars, conditioned to pay all costs awarded against him by reason of such appeal, and to prosecute such appeal to effect.

20 Know all men by these present- that we, the undersigned, Charles E. Whitehead, trustee, of the city and State of New York, and John F. Duncombe and James B. Williams, sureties, of

the city of Fort Dodge, in the State of Iowa, are jointly and severally held and firmly bound unto E. E. Shattuck and —— Jansen in the penal sum of five hundred dollars, for the payment of which we do bind ourselves and heirs and legal representatives firmly by these presents.

Signed this — day of September, A. D. 1887.

This obligation to be void in case the said Whitehead shall prosecute his appeal to effect, and if he fail to make his plea good shall answer all costs made on such appeal, wherein he has appealed from the decision of the United States circuit court for the northern district of Iowa, central division, in the case of Charles E. Whitehead, trustee, *vs.* E. E. Shattuck and —— Jansen, the same being No. 31, chancery; otherwise to remain in full force and effect.

CHARLES E. WHITEHEAD, *Trustee*,
By J. F. DUNCOMBE, *Sol., Principal.*
J. F. DUNCOMBE,
JAMES B. WILLIAMS,
Sureties.

STATE OF IOWA, }
Webster County, } *ss:*

I, J. F. Duncombe, on oath, state that the sureties signing
21 the above bond have unincumbered property, real estate, in Webster county, Iowa, of the value of over one thousand dollars, subject to execution.

JOHN F. DUNCOMBE.

Sworn to and subscribed before me & in my presence by J. F. Duncombe this — day of September, A. D. 1887.

[SEAL.] W. C. BAEHRING,
Notary Public.

Endorsed: Within bond & sureties approved. O. P. Shiras, U. S. judge.

22 UNITED STATES OF AMERICA, *ss:*

To E. E. Shattuck and Peter Jensen, appellees:

You are hereby cited and admonished to be and appear, within thirty days from this date, at a Supreme Court of the United States now being holden at Washington, D. C., pursuant to an appeal this day perfected in the office of the clerk of the circuit court of the United States in and for the northern district of Iowa, central division, in a suit wherein Charles E. Whitehead, trustee, is appellant, and you are appellees, to show cause, if any there be, why the judgment appealed from should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable O. P. Shiras, judge of the circuit court of the United States, northern district of Iowa, this — day of *14th*, A. D. 1887.

O. P. SHIRAS, *Judge.*

I hereby accept service of the above citation this 14th day of September, 1887.

G. H. SHELLENBERGER,
Att'y for Defendants in Error.

23 In the Circuit Court of the United States for the Northern District of Iowa.

I, A. J. Van Duzee, clerk of said court for said district, do hereby certify that the foregoing transcript contains a full, true, and complete copy of the papers, pleadings, proofs, and orders of the court and all record entries in a certain cause in said court wherein Charles E. Whitehead, trustee of the Des Moines and Fort Dodge Railroad Company, is complainant and Peter Jensen and E. E. Shattuck are respondents, appealed to the Supreme Court of the United States, as full, true, and complete as the original- of the same now remain on file and of record. I further certify that the original citation, with the return of service thereon, is hereto attached and returned as part of this transcript.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Fort Dodge, in said district, this 21st day of September, A. D. 1887.

[Seal District Court U. S., Northern District of Iowa. Fort Dodge.]

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa,
By W. H. JOHNSTON, *Deputy.*

$5.00 fees, paid by J. F. Duncombe, sol'r for complainant.

Endorsed on cover: N. Iowa C. C. U. S. No. 1086. Charles E. Whitehead, trustee of the Des Moines and Fort Dodge Railroad Company, appellant, *vs.* E. E. Shattuck & Peter Jensen. Filed October 1, 1887.

Office Supreme Court U. S.
FILED.
JAN 2 1891
JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 128.

CHARLES E. WHITEHEAD, TRUSTEE, ETC.,
APPELLANT,
VS.
E. E. SHATTUCK, et al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

REPLY TO APPELLANT'S ARGUMENT
BY J. F. DUNCOMBE.

Supreme Court of the United States.

OCTOBER TERM, 1890.

CHARLES E. WHITEHEAD,
Trustee; etc., Appellant,
vs.
E. E. SHATTUCK et. al.

No. 128.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

J. F. DUNCOMBE for Appellant.

I.

This case is one, as before stated in argument, of a large number of cases pending in the United States Circuit Court for the Northern District of Iowa, involving the question, whether under the Iowa statute which gives the right to a party, not in possession, to bring suit in equity in the State Court to remove clouds upon title, such as defendants' evidence of title creates, and to quiet appellant's title, this suit can be maintained in the United States Court.

The question was argued and the opinion filed in one of the cases, (Whitehead, Trustee, vs. Entwhistle,

27, Fed. Rep. 778) but no decree rendered in that case, and that and the other cases have been since continued awaiting the decision of this court in the case now pending.

The cases have been so continued by consent of all parties, for that purpose, and this case was appealed, as fully understood by all parties, to obtain a decision solely upon the question of jurisdiction.

The opinion of the court in the case argued and decided (27 Fed. Rep. 778) shows that the question of jurisdiction was the only question discussed or even referred to by the court.

Now, certain new questions are made in the brief of the learned counsel, which if determined against complainant would, unless the question of jurisdiction is settled, leave the other cases in the same condition as when the appeal was taken.

We shall, however, briefly notice some of these new points.

I.

The first point made, is, that "appellant does not show that he has title to the real estate in controversy."

We answer, the bill avers that complainant "is the owner in fee simple and has the title thereto in his own name," but that he is trustee for the Des Moines & Fort Dodge Railroad Company. (Ab. p. 7.) Appellant further avers, "that he has attached to his original bill of complaint filed herein (Ab. pages 1, 2, 3,) an abstract showing the source from which his title is derived and his chain of title to said property," and

he makes this abstract a part of his amended and substituted bill of complaint.

This is certainly a sufficiently explicit allegation of title, to prevent any intelligent person from mistaking what appellant's title is. But the learned counsel contends that it was necessary to allege that the lands in controversy were within five miles of the Des Moines river. The acts of Congress set out in the abstract, only granted lands within five miles of the Des Moines river.

Complainant says he has the title in his own name and received his lands under these acts, and if he did, the lands must have been within the grant.

No complaint is made that the abstract is defective in form, or that it fails to show a perfect chain of title if the grant included these lands, and that is what the bill in substance, at least, clearly alleges.

The *evidence* of title need not be plead.

II.

It is contended that the effect of appellant's bill "is a claim of title in the alternative."

The learned counsel fails to show in what respect the claim of title is in the alternative. Because an abstract shows a tax title deed and sheriff's deed to the same person, and these are all set out in an abstract of title, is the claim of title in the alternative?

Certainly the abstract set out in this case does no more than to allege different acts of Congress and of the State Legislature necessary to perfect the title in appellant.

III.

The third point of contention by the learned counsel is "that appellant's bill shows that he is a trustee and makes no showing that his trust is of such a nature as to enable him to proceed without the presence of his *cestuis que trust.*"

The bill of complaint expressly avers that "he has the title in his own name." (Ab. p. 7.) It does not matter, therefore, to defendant whether he is a trustee or not.

If the defendant sought to defeat appellant's right on the point made, it would be necessary to set out his defense in his answer, and then prove it.

IV.

We deem it unnecessary to enter upon the discussion of the fourth point made, as it has been discussed in our former brief.

The question is, can a United States court of equity enforce an equitable right which a State law has enlarged?

There is no question but what a government patent is a cloud upon any adverse title. It is no less a cloud whether the holder of the patent or his adversary is *in* or *out* of possession.

The old rule of equity says, if the person claiming by some other title is not in possession, his title must be tried by a jury. The state of Iowa understanding how small a chance one claiming adversely to a patent, or a certificate of entry, or any adverse claim of one in possession as a settler has, to secure his rights, steps

in and says to the claiment *out* of possession you may have this equitable right, the same as if in possession, you may quiet your title, you may remove these clouds from your title, as well when you are *out* of possession, as when *in* possession.

The *right* is exactly the same in either case. The *result* is the same as to the title, or evidence of title. The evidence to reach the result is the same in either case. The decree may be the same.

The argument, therefore, about a jury trial, about an adequate, speedy legal remedy, about the statutes prohibiting equity suits in cases having a plain, adequate, and complete remedy at law, it seems to us, assumes a state of facts that does not exist in this case.

What difference does it make to any one seeking to quiet a title, or remove the clouds on his title, whether he is *in* or *out* of possession?

Suppose in this case that appellant had been *in* possession, could there be any doubt that in equity he could quiet his title against defendant holding his four claims of adverse title? (Ab. p. 8.)

Suppose defendant *out* of possession had sued appellant in possession in ejectment, could not appellant have alleged fraud in the procuring of each and all of defendant's evidences of title, and tried his case atlaw? Yet it will not be denied that appellant so sued, could file a bill to quiet his title, and remove the clouds therefrom, and thus prevent a trial by jury.

The distinction that the Supreme Court of the United States makes in the cases referred to in our former brief, and those referred to by the learned counsel as we understand it, is, that while no *new* equitable right can be created by a State statute, yet the *enforcement* of an equitable right may be extended by a State

statute to one who before could not exercise such a right.

Equity has grown up from a very small beginning. Equitable jurisdiction to persons in different conditions has been very greatly extended.

With a hostile community favoring men who are in possession, a jury trial in that community is a substantial refusal to protect property, and the rights of persons who are not in possession.

The Legislature of the State provided for this. The privilege of trying, in a court of equity, the same right when *out* of possession as when *in* possession, was given by the State.

The State has by repeated decisions sustained this extension to one not in possession, and as we understand the decisions of the Supreme Court of the United States, before referred to, this court has done the same thing.

We cannot see the lack of harmony in the decisions of this court that the learned counsel finds, or that the learned Judge who delivered the opinion referred to seems to find.

V.

The fifth point made by the learned counsel, as to the decisions of the Iowa court on the question of the right of one not in possession to maintain an action in equity to quiet title, is fully answered by the cases cited in our former brief, and by the learned Judge in his opinion in the Entwhistle case before referred to, and in the cases referred to by him.

VI.

The sixth point, relates to the same question already discussee.d

The appellant claims more than simply a *legal* title. He avers that defendant has certain evidences of title that are clouds upon his title; a patent; a certificate of entry madə by the laws of Iowa evidence of title; certain deeds made under a certain grant claimed to include these lands.

These evidences of title, except the last are alleged to have been fraudulently procured.

If any of them are clouds upon the title of appellant he is entitled to a decree in this case removing them, whether he may have a writ of possession awarded or not, or whether after having his title cleared up and quieted he is then turned over to his action of ejectment.

VII.

In reply to the seventh point made by the learned counsel, we will only call the attention of the court to the cases attempted to be criticised.

If these cases do not sustain our position, no argument of ours will do it.

VIII.

The learnəd counsel jocularly refers to the decrees made by the United States Circuit Court quieting the

titles of these Des Moines Riverlands, by suits in equity. by parties not in possession which lands have been in litigation for more than a third of a century.

Our reference to these decisions did not, as counsel seems to desire it to appear, relate to any one "collatterlly" seeking to disturb worthless titles, (which would be the case if the court has no jurisdiction in equity in this case), but to the holders of titles under these decrees.

Having answered the points made by the learned counsel, we submit the case, only anxious that it may be decided upon the very important question of jurisdiction, and not upon some question not presented in the court below.

J. F. DUNCOMBE.
Sol. for Compt. Appellant.

Office Supreme Court U. S.
FILED.
AUG 23 1889
JAMES H. McKENNEY,
CLERK.

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1086.

CHARLES E. WHITEHEAD, TRUSTEE OF THE DES MOINES & FORT DODGE RAILROAD COMPANY, APPELLANT,

vs.

E. E. SHATTUCK AND PETER JENSEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

J. F. DUNCOMBE, *Solicitor for Complainant.*
C. A. CLARK AND G. H. SHELLENBERGER,
Solicitors for Defendants.

FILED OCTOBER 1, 1887.

TRANSCRIPT OF RECORD.

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Argument by J. F. Duncombe, Solicitor for Complainant, Appellant.

This is one of about twenty suits brought by complainant to quiet his title to part of what is known as the Des Moines River Grant, and remove the cloud therefrom. This grant is too well understood by the court to need comment. The facts as shown by the bill of complaint are these: The complainant, Charles E. Whitehead, is the owner in fee simple, and has the title in his name (although holding in trust for the Des Moines & Fort Dodge Railroad Co.) of the lands in controversy. The defendant is in possession of the lands and claims title through two sources. One, an entry made in U. S. Land Office as government lands, for which he has a certificate of entry and patent; the other by purchase from grantees of the railroad company which claimed the lands under the Dubuque & Pacific Railroad grant of 1856, to which company the land department certified these lands.

The bill of complaint recites that, notwithstanding complainant is the owner in fee simple of the property and is entitled to the immediate possession, the defendant is in possession and holds the property adversely to complainant and makes the claim of title through his entry and certificate of entry (or duplicate receipt) in the government land office (which is under the laws of Iowa evidence of title, Code 3709) and a United States patent, and also makes a claim by purchase from the grantees of the railroad company, which company claimed title under the railroad grant from the United States of 1856, and that these evidences of title are clouds upon complainant's title and prevent the sale thereof, etc.

The defendant demurred to the bill of complaint on several grounds, but the only one argued in the court below or which will now be considered, is the one which raises the question of jurisdiction:

Has the United States Court equitable jurisdiction?

Unless the Statutes of Iowa change the rule, a suit in equity cannot be maintained when the defendant is in possession. We contend this rule does not apply where an enlarged equitable right has been given by a State statute, and where a cloud exists by patent, etc.

The Supreme Court of the United States has expressly held in such a case, that the jurisdiction of the court extends to the rights so enlarged.

Sec. 2025 of the Code of Iowa of 1851, reads as follows:

"An action in the nature of that authorized in this chapter, may also be brought by one having a reversionary interest or by one *either in or out of possession*, against another who claims title to real property, although the defendant may not be in the possession thereof, for the purpose of determining and quieting the question of title."

Sec. 3601, of the revision of 1860 of the laws of Iowa, is the same as Sec. 2025 of Code 1851.

Sec. 3273 of the Code of Iowa of 1873, reads as follows:

"An action *to determine and quiet the title* to real property may be brought by any one having or claiming an interest therein, *whether in or out of possession* of the same, against any person claiming title thereto, though not in possession."

In the case of

Holland vs. Challen, 110 U. S. p. 15,

the court construe the statute of the State of Nebraska, which reads as follows, viz:

"That an action may be brought and prosecuted to final decree, or order by any person or persons, *whether in actual possession or not*, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate."

The wording of this statute and of Sec. 3273, Code of Iowa, is somewhat different, but the substance and meaning of the two statutes are the same.

The case in which the Nebraska statute is commented up-

on in 110 U. S. p. 16, is a bill to quiet title. Plaintiff claimed under a tax sale. Defendant was owner prior to the tax sale, and the bill charged that defendant claimed to be the owner and was trying to obtain, take and keep possession of the land. Defendant demurred, and the court below dismissed the bill for want of jurisdiction, and this court reversed the decree and ordered the cause remanded, with leave to the defendant to answer the bill.

It was contended by counsel for appellee that the bill stated no facts constituting grounds for equitable relief, and that the allegations in the bill were sufficient, as the basis of an action to recover possession.

The court in commenting on the Nebraska statute say:

"The statute of Nebraska *enlarges the class of cases* in which relief was formerly afforded by a court of equity in quieting title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie."

The court then go on to state, that formerly, such an action would not lie "only when the plaintiff was in possession"; but that *now*, "in most of the states in this country, and Nebraska among them, (so also in Iowa) the action of ejectment to recover the possession of real property as existing at common law has been abolished with all its fictions. Actions for the possession of such property are now, not essentially different in form, from actions for other property." A bill to remove a cloud upon the title of real estate, the court say, differed from a bill of peace, in that it simply sought to prevent future litigation by removing existing causes to the controversy as to the title. "To maintain a suit of this character it

was generally necessary (say the court) that the plaintiff should be in possession of the property."

"The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and *without reference to his possession.* Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title."

The court then refers to the case of Clarke vs. Smith, 13 Pet. 196, as to a law of Kentucky, regulating proceedings in courts of Chancery, or enlarging rights in such courts, as follows:

"That any person having both the legal title to and possession of land may institute a suit against any other person setting up a claim thereto, and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claims thereto," etc.

In this case, by a divided court, the bill was dismissed. The Supreme Court of the United States reversed the decision. In commenting on the case the court say:

"The State legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States, *but having created a right and at the same time prescribed the remedy to enforce it*, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the State court; on the contrary propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation. And such is the constant course of the federal courts."

The opinion concludes as follows:

"That when investigating and decreeing on titles in this country we must deal with them in practice as we find them, and accommodate our modes of proceeding, in a considerable

degree to the nature of the case and the character of the equities involved in the controversy, *so as to give effect to State legislation and State policy;* not departing, however, from what legitimately belongs to the practice of a court of chancery."

The court, after making extensive quotations from the case of 13 Pet., 196, go on in the Holland vs. Challen case, and say, 'The *equitable rights* of parties in Nebraska claiming the legal title to real property, are simply *enlarged by its statute*, not changed in character.'"

The court then quotes from 21 Wall., 520, Broderick Will Case, as follows:

"Whilst it is true that alterations in the jurisdiction after the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, *yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the state.*"

We have quoted so much from this decision, and the decisions to which it refers, to show, that it is the doctrine of the Supreme Court of the United States, that where there is a statute creating or enlarging an equitable right, that a United States Court of equity has jurisdiction to enforce that right precisely the same as a court of equity would have jurisdiction to enforce any other equitable right, and that such "equitable rights may be administered by the Circuit Courts of the United States as well as by the courts of the state."

Now the next question is, does our Iowa statute enlarge the equitable right to have one's title quieted in an action in chancery so as to include a case where the complainant is not in possession and the defendant is in possession, claiming title adverse to complainant?

Fortunately the Supreme Court of the United States has answered that question in the case of

Reynolds vs. Crawfordsville First National Bank, 112 U. S. 405.

This was a bill in equity to quiet title and restrain waste filed by the bank against the appellant, Reynolds. The prayer of the bill was for a decree quieting the title of the bank in the property and enjoining waste by Reynolds. A decree was entered quieting complainant's title and declaring the deed to Reynolds void—this being the deed complained of in the bill of complaint under which he claimed title. Reynolds appealed. The Supreme Court affirmed the decree.

This case was tried on bill and answer on motion of complainant, on the contention that he was entitled to the decree prayed for in his bill upon the admission, and notwithstanding the denials of the answer.

On the trial, Reynolds, appellant, contended that the court had no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face.

The court, (p. 410) say, that a state law, "can give a substantial right of such a character that when there is no impediment arising from the residence of the right parties, may be enforced in the proper federal tribunal whether it be a court of equity, admiralty or common law," quoting *ex parte* McNeil, 13 Wall. 236, 243.

The court after arguing the question go on to say, that

"The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it."

Sec. 1070, Rev. Stat. of Indiana, 1881, provides as follows:

"An action may be brought by any person, either in or *out of possession*, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining the question of title."

"This act," say the conrt, "confers upon any one, against whom another, *whether in or out of possession, claims an ad-*

verse title or interest in real estate, the substantial right of having the disputed title settled by action of the courts."

Under this statute it has been decided by the Supreme Court of Indiana that such an equitable action can be maintained.

The court say, the statute "applies in every case where defendant claims an adverse interest in or title to the property in controversy," and the court further say, "it is clear that the assignment of error under consideration has no support." The assignment of error raised the precise question under discussion in this case.

In the case of Reynold's vs. Bank, Reynolds was allowed to retain possession of the property for a time (p. 407) and held it under a deed from one Baird, assignee of his estate to him.

The complainant was not in possession.

If the Indiana statute is substantially the same as the Iowa statute, this case certainly decides the question in the case now under consideration.

The Indiana statute gives the right to "any person in or out of possession," to bring an action "to determine and quiet his title, when complainant has an interest in the property."

The Iowa statute gives the right to bring an action "to determine and quiet the title of real property," "whether in or out of possession," to "any one having or claiming an interest" in real property—almost the identical language.

The Indiana statute authorizes such action to be brought "*against* another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof."

The Iowa statute authorizes such action to be brought "*against* any person claiming title thereto, though not in possession."

It is evident from the similarity of the two statutes, that the Iowa statute was copied from the Indiana statute. It says the same thing in substance, with the same meaning, but in less words.

Now, following the decision of the Supreme Court of the United States in the Indiana case, where that court refer to and quote the decision of the Supreme Court of Indiana, we will refer to the decisions of the Supreme Court of Iowa, and see what rights are necessary to be set out in the bill in order to maintain this action in the state court, and how far this statute has been passed upon by our Supreme Court.

The case of Fejervary vs. Langer, (Sec. 2520, Code of 1851) 9th Iowa, 159, holds that "in order to maintain this action in equity to quiet title, there must be an allegation that defendants *claim title* to the land." P. 161. This is done in complainant's bill of complaint.

The case of Paton vs. Lancaster et. al., 38 Iowa, 494, holds that a petition substantially embodying the averments of the statute, with a general prayer for relief, is sufficient. This averment and prayer is in complainant's amended and substituted bill of complaint. Ab. p. 7.

The claim of title is as follows:

"*a.* Under a pre-emption and homestead claim and entry under said claim in the United States Land Office.

b. Under a certificate of entry of said land given by the United States Land Office, which by the laws of the State of Iowa is made evidence of title.

c. Under a patent issued by the Land Department of the United States made upon said land as Government lands subject to entry.

d. Under a deed of the Iowa Homestead Co., the grantee of the Dubuque & Sioux City R. R. Co., which company claimed title from the act of Congress entitled "An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," and a certificate of the proper officer of the Land Department of the United States setting apart said lands to said company as a portion of said grant."

The case of Laverty et. al. vs. Sexton & Son, 41 Iowa, 435, holds that the executors of an estate entitled to the possession and control of land, have sufficient interest to sup-

port an action under the statute to quiet title. In the case now under consideration, complainant is owner in fee simple, having the legal title.

The case of Barrett vs. Love, 48 Iowa, 103, holds that either a tax owner or the former owner may bring an action to quiet title under this statute. This makes the right very general as construed by the Iowa courts.

Other equitable relief besides a decree quieting title may be given in an action under this Iowa statute.

Buena Vista County vs. I. F. & S. C. R. R. Co., 49 Iowa, 657.

Sec. 3276 of the Iowa Code, makes this action an action in equity and requires it to be conducted as such.

The case of Lewis vs. Soule, 52 Iowa, 11, holds that an action to quiet title to real property may be brought against a person in the possession thereof, under this statute, "in all cases where the defendant makes some claim adverse to the estate of plaintiff" (p. 13). The defendants claimed to be the *owners*, and that, the court held to be sufficient. Same doctrine in Lees vs. Wetmore, 58 Iowa, 170.

This is our case precisely, passed upon by the Iowa courts.

The cases decided by the Supreme Court of the United States before referred to, certainly hold that the U. S. courts will enforce these same equitable rights given by a state statute, where by the decisions of the State court construing such a statute complainant avers sufficient in his bill to give him the right in the State courts, to maintain an equitable action.

The last case, 58 Iowa, 170, not only holds that the complainant *out* of possession may under this Iowa statute maintain this action to quiet title against defendant *in* possession, but may include a prayer to recover possession.

The case of Wells, Fargo & Co., vs. Miner and others, 25 Fed. Rep. 533, contains a full collection of authorities bearing upon the subject under discussion, holding the same doctrine here contended for.

Collection of authorities, p. 536.

The latest case decided by the Supreme Court, enforcing

such a right in equity, under state statutes, is Chapman vs. Brewer, 114 U. S., p. 170 While this case does not decide the precise point in controversy, it decides the precise principle that gives this court equitable jurisdiction under our Iowa statutes (see page 158). The court *decided* the case under the Michigan statute and referred to the cases of

Clark vs. Smith, 13 Pet. 195–203.
Broderick's Will, 21 Wall. 503, 519, 520.
VanNowden vs. Morton, 99 U. S. 378, 380.
Cummings vs. National Bank, 101 U. S. 153, 157.
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The court say, referring to the Michigan statute, "In such a case a Circuit Court of the United States, having otherwise jurisdiction in the case, will, as a general rule, administer the same relief in equity which the State court can grant."

It is true the Supreme Court in Chapman vs. Brewer did not rest the case upon the jurisdiction arising from the Michigan statute, alone, (for the court held equitable jurisdiction existed under the bankruptcy act) but that does not affect the position taken by the court upon the effect of a State statute granting a new right or enlarging an old right.

In these Des Moines river land cases, it has been our lot as an attorney for claimants occupying the exact position of defendant in this case, to represent the other side of this case, but always unsuccessfully. Repeatedly cases have been brought by parties not in possession, in the U. S. Circuit Court at Des Moines to quiet title, and remove the cloud caused by patents, and certificates of entry, against parties in possession of the property.

We do not think that less than from one to three hundred decrees have been so entered, which, if the court had no jurisdiction in equity, are void.

If the decrees are nullities, then the statute of limitations has run against law actions, as would be the fact in the case on hearing.

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The case of Wells, Fargo & Co. vs. Miner, 25 Fed. Rep.

533, decided by the Circuit Court of the U. S., California, opinion by Judge Sawyer, reviews the decisions relating to enlarged and new rights created by statute, and holds that where State statutes enlarge equitable rights by creating new remedies, such remedies may be enforced in those courts.

Relying upon the case of Reynolds vs. Crawfordsville Bank, 112 U. S. 405, as deciding this case, and that the doctrine contended for has been settled by the Supreme Court of the United States, as well as by the Supreme Court of the State of Iowa in favor of the equitable jurisdiction of this court, we submit the case.

J. F. DUNCOMBE,
Sol. for Complt. Appellant.

Supreme Court, U. S.
FILED
DEC 11 1890
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

October Term, 1890.

No. 128.

CHARLES E. WHITEHEAD, TRUSTEE, ETC., *Appellant*,

vs.

E. E. SHATTUCK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLEES.

BY CHAS. A. CLARK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

CHAS. E. WHITEHEAD, Trustee, etc., *Appellant.*
vs.
E. E. SHATTUCK, ET AL., } No. 128.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

CHAS. A. CLARK, *for Appellees.*

BRIEF FOR APPELLEES.

I.

The demurrer to appellant's bill was rightfully sustained by the court below, because appellant does not show that he has title to the real estate in controversy. The allegation in his bill that he is "owner in fee simple and has title thereto in his own name" stands for nothing. The appellant must plead facts showing his title.

"If *facts are not stated* in the bill, from which the court will infer a title in the plaintiff, *although the bill does contain the assertion that the plaintiff has title*, the defendant may demur; the averment of title in the bill being not of a fact, but of a consequence of facts."

Story's Eq. Pl., Sec. 730.

"The want of interest of the plaintiff in the subject matter of the suit is fatal upon demurrer."

Story's Eq. Pl., Sections 508, 260, 261, 318.

Outside of the general allegation of title, the *facts* alleged by plaintiff to show his title, are by reference to the abstract attached to his bill of complaint, marked exhibit "A". (Record page 7.)

This abstract is found on page three of the record. It shows a claim of title under the act of August 8th, 1846, or under the joint

resolution of congress of March 2nd, 1861, or under the act of July 12th, 1862, all relating to the Des Moines River lands, so-called.

But there is no allegation in the bill that the lands in controversy are within the geographical limits of this grant, or in any manner subject to the grant. The appellant claiming under the grant must certainly state facts sufficient to show that the land was subject to the grant and passed by it.

The grant was limited to lands within five miles of the Des Moines river. There is no allegation that the lands in controversy are within that distance of the Des Moines river.

Again, the original act of 1846 required the alternate sections of lands granted thereby, *to be selected by agents of the state.* If appellant claims under this act, no such selection is alleged or shown.

The joint resolution of March 2nd, 1861, only relinquishes the title to lands erroneously certified under the act of 1846. There is no allegation that the lands in controversy had been so certified prior to the passage of this joint resolution.

The act of July 12th, 1862, is limited to lands not "sold or otherwise disposed of by the United States before the passage of this act, except those released by the United States to the grantees of the state of Iowa, under the joint resolution of March 2nd, 1862."

The appellant's bill does not show that these lands were not so sold or otherwise disposed of prior to the passage of said act of 1862.

II.

The effect of appellant's bill, taken in connection with his abstract of title, *is a claim of title in the alternative*, namely; that appellant has title under the act of 1846, *or* under the joint resolution of 1861, *or* under the act of July 12th, 1862.

Waiving, for the purposes of the argument, the point that no facts are pleaded showing the lands in controversy are subject to any of these grants, such plea of title in the alternative *is so vague and indeterminate* that a demurrer should be sustained to the bill.

Story's Eq. Pl., 9 Ed. Sections 243 to 250.

III.

The appellant by his bill shows that he is a trustee, and makes no showing that his trust is of such a nature as to enable him to proceed without the presence of his *cestui que trust.*

The general rule is that in suits respecting trust property, brought either by or against trustees, the *cestuis que trust*, as well as the trustees, are necessary parties.

Story's Eq. Pl., Section 207.

It is true that this court has decided that in an action to obtain the *possession* of trust property, the trustee may proceed without making his beneficiary a party.

Cary vs. Brown, 92 U. S. 172.

In that case, however, *the nature of the trust clearly appeared upon the face of the record*, and it was shown to be of such a character that it was not necessary to join the *cestui que trust* as a party, with the trustee. The same remark applies to all of the authorities cited by this court in the above case. In every one of them it appears upon the face of the record, that the presence of the *cestui que trust* was not requisite to a full determination of the suit between the parties.

In the case at bar, however, the nature of the trust is in no manner set forth. It may very well be that the appellant holds the legal title, under a written declaration of trust, by which he is to be bound in all the particulars by directions of his *cestui que trust* touching the management and control of the property, and touching all his acts and doings in relation thereto.

The averment in the bill warrants but one conclusion, namely; that the appellant holds the dry legal title to the land, in trust for his beneficiary named in the bill.

"In such case the *cestui que trust* is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyance of the legal title as he directs. In short the *cestui que trust* has an absolute control over the beneficial interest, together with a right to call for the legal title, and the person in whom the legal title vests is a simple, or dry trustee."

2 Perry on Trusts, Second Edition, Sec. 520.

"It is further to be remarked that there can be but few of these dry trusts, for where there is no control, and no duty to be performed by the trustee, it becomes a simple use which the statute of uses executes for the *cestui que trust*, and who thus unites both the legal and beneficial estate in himself."

2 Perry on Trusts, Section 521.

The statute of uses is in force in the United States and vests the legal title in the beneficiary.

1 Perry on Trusts, Sections 298, 299.

It is in force in the state of Iowa.

Pierson vs. Armstrong, 1 Iowa, 282.

It is obvious that under a trust, which so far as the averments of the bill are concerned, may vest the full legal title in the *cestui que trust*; such *cestui que trust* is a necessary party to the suit.

For while there are cases in which a trustee may make a sufficient showing to enable him to maintain a suit without the presence of his *cestui que trust*, yet it devolves upon him to make such affirmative showing in order to take his case out of the general rule, and the appellant has wholly failed to make such showing in the case at bar.

"A person may be appointed the agent or representative of others, in such a manner that he may sue and be sued alone, and

without joining such other persons; *but the intention* to constitute such an absolute representative *must very clearly appear.* Trustees are not such agents or representatives. They do not own the property beneficially, though the legal title is in them; they are in some sense the agents and representatives of the *cestui que trust*; but they are not agents for the purpose of defending the property against adverse claims of third persons, *without the knowledge, and behind the backs of the real owners.*"

2 Perry on Trusts, Section 874.
Holland vs. Baker, 3 Hare, 72.

It is certain that the intention to create appellant such a trustee as this does not "very clearly appear," or appear at all, by inference or otherwise. The demurrer was, therefore, rightly sustained by reason of a defect of parties.

IV.

The opinion of the court below, sustaining the demurrers in this series of cases, was by Shiras, Judge, and concurred in by Mr. Justice Brewer, now of this court. As this opinion was not filed in this particular case selected for appeal, it does not appear in the record. It is the case of

Whitehead, Trustee, vs. Entwhistle, 27 Fed. Rep., 778.

This opinion sustains the demurrer to the bill upon the following impregnable grounds:

"Section 723 of the revised statutes provides that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law.' As is said by the supreme court in Lewis vs. Cocks, 23 Wall., 466, this provision of the statute is only declaratory of a principle which is as old as the earliest period of the recorded history of English equity jurisprudence. By express declaration of the constitution of the United States it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' If, then, a plain and adequate remedy exists at law, a defendant cannot be called upon to submit his rights to the decision of a court of equity, because he has a constitutional right to a trial by jury. Hipp vs. Babin, 19 How., 271, Lewis vs. Cocks, 23 Wall., 466, Lillian vs Ebbinghaus, 110 U. S., 568, S. C. Sup. Ct. Rep., 232, Fussell vs. Gregg, 113 U. S. 550, S. C. Sup. Ct. Rep., 631."

As to the contention of the appellant in the court below, and in this court, that the statute of Iowa under which appellant is proceeding gives a new equitable remedy to be administered by the federal courts, so that what this court has often termed "an ejectment bill," may be maintained in the federal courts against a defendant in possession of real estate, although the plaintiff holds the legal title and has a plain, speedy and adequate remedy at law, the court below in the case above cited said:

"If then, it be true that the state statute can, by enlarging equitable rights and remedies, confer upon the United States courts equitable jurisdiction in a case wherein there exists a plain and adequate remedy at law, it follows that indirectly, but effectually, state legislation has abrogated section 723 of the revised statutes, which expressly forbids the United States courts from taking jurisdiction in equity in cases wherein the remedy at law is adequate, *and has annulled the constitutional provision securing the right of trial by jury.*"

Whitehead, Trustee, vs. Entwhistle, 27 Fed. Rep. 781.

That a statute of a *territory* having this effect in the federal courts is void has been expressly decided by this court.

Webster vs. Reid, 11 How., 460.

It is obvious that a statute of a *state* having the effect of denying a trial by jury at common law is likewise void as to the federal courts, or rather, speaking more accurately, that it has no application to them.

For these reasons the decisions of the supreme court of Iowa touching the administration of the remedy in the state courts, under the statute relied upon by appellant, can have no weight as to the question involved in the federal courts.

If the supreme court of Iowa, in the face of the provision in Article 1, Section 9 of the state constitution that:

"*The right of trial by jury shall remain inviolate*, but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts;" — has seen fit to hold, that the statute in question takes away the right of trial by jury in the state courts, in cases of this character, that is one thing.

But that such a statute of the state cannot, in the federal courts, impair the right of trial by jury guaranteed by the Seventh Amendment in those courts, and cannot confer jurisdiction upon the courts of equity where there is a plain, speedy, and adequate remedy at law, under Section 723 of the Revised Statutes is too plain a proposition to require argument.

V.

Appellee, however, does not admit that the supreme court of Iowa has encroached upon the provision of the state constitution above cited, as is claimed by counsel for appellant in his argument.

The cases relied upon by appellant are,

Lewis vs. Soule, 52 Iowa, 11.
Lees vs. Wetmore, 58 Iowa, 170.

These cases arose under the following provisions of the Code of Iowa, 1873, regulating the trial of civil action:

Sec. 2507. "All forms of action are abolished in this state; but the proceedings in a civil action may be of two kinds, ordinary or equitable."

Sec. 2508. "The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this Code, had jurisdiction; and must so proceed in all cases where jurisdiction was exclusive."

Sec. 2513. "In all other cases, except in this Code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings."

Sec. 2514. "An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket."

Sec. 2515. "Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards, on motion in court."

Sec. 2516. "The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provisions of this Code the wrong proceedings have been adopted."

Sec. 2519. "*An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed in this chapter;* and all errors in the decisions of the court are waived unless excepted to at the time, except final judgments and interlocutory or final decrees entered of record."

Under these provisions of the Code it has been often decided by the supreme court of Iowa that a failure to object to a suit wrongfully brought in equity, by a motion to change the same to "ordinary proceedings," i. e., an action at law, within apt time in the trial court, is a waiver of all right to object to the jurisdiction in equity.

Parshall vs. Moody, 24 Iowa, 314.
Greene vs. Marble, 37 Iowa, 95.
Knott vs. Tichner, 39 Iowa, 628.
Richmond vs. R. R. Co., 33 Iowa, 490.
Tugel vs. Tugel, 38 Iowa, 349.
Gould vs. Hertel, 61 Iowa, 45.

Under the Code practice of Iowa, and the above decisions construing this practice, the decisions relied on by appellant arose. In *Lewis vs. Soule*, 52 Iowa, 11, which was a suit in equity to quiet title, where the evidence "tended to show that the defendant was in possession of the real estate." The supreme court said:

"*It was the defendants' right to have the action tried as an action at law, and if they omitted to avail themselves of that right it is too late to complain now.*"

Showing clearly that the decision was placed upon the ground that the defendant did not, in the trial court, as required by the statute, move to change the suit from equitable to ordinary proceedings, or in other words, from equitable proceedings to an action at law.

And in the same opinion it is said:

"Where the defendant is in possession the action to recover real property is more appropriate because more effectual. The plaintiff,

if successful, becomes entitled to a writ of possession."

So in the case of *Lees vs. Wetmore*, 58 Iowa, 171, relied upon by appellant. That was originally an action at law. The plaintiff filed a substituted petition, and it is said in the opinion:

"After this pleading was filed, the cause upon the application of plaintiff, was transferred to the equity docket, and tried as an action (*sic*) in chancery. Defendant insists that this action was erroneous for the reason that he is in possession of the land and that plaintiff's proper remedy is an action at law to recover the possession."

It does not *appear*, however, that the defendant excepted to the action of the court below, so as to enable him to take advantage of this alleged error in the supreme court, and it is fairly open to inference that this is the ground upon which the action of the trial court was affirmed.

For the supreme court of Iowa has often decided that the right of trial by jury, guaranteed by the state constitution, cannot be abrogated or encroached upon by legislation.

Burrows vs. State, 1 Iowa, 374.
Santo vs. State, 2 Iowa, 165, 221.
State vs. Kauffman, 51 Iowa, 578.
McMartin vs. Bingham, 27 Iowa, 236.
Marshalltown vs. Forney, 51 Iowa, 584.
Henderson vs. Rainbow, 76 Iowa, 320.
Galliers vs. Peppers, 76 Iowa, 522.
Keokuk vs. R. R. Co., 77 Iowa, 225.
Eshelman vs. R. R. Co., 67 Iowa, 296.
Kelsh vs. Dyersville, 68 Iowa, 137.
Blair, Etc., Co., vs. Walker, 50 Iowa, 376.

VI.

As pointed out by the court below in *Whitehead, Trustee, vs. Entwhistle*, 27 Fed. Rep., 778, cited supra, this court has often decided that "~~a bill in~~ an ejectment bill" cannot be maintained where the defendant is in possession of real estate, and the complainant claims under a legal title. In one case this court said:

"It is the universal practice of courts of equity to dismiss the bill if grounded upon a merely legal title. *In such case the adverse party has a constitutional right to a trial by a jury.* * * * In the present case the bill seeks to enforce a merely legal title. *An action in ejectment is an adequate remedy.*"

And in that case the objection not having been raised by demurrer it was held that it was "the duty of the court *sua sponte* to recognize it and give it effect."

Lewis vs. Cocks, 23 Wall., 466.

In another case it was said:

"This case is, therefore, an ejectment bill brought on an equitable title. * * * * Their (the defendants) possession is good

against all the world except the true owner. As the bill asserts no equity against them, they have the right to stand on their possession until compelled to yield to the true title, *and to demand a trial by jury of the question whether the plaintiff has the true title.* The plaintiff cannot deprive them of that right by neglecting to acquire the legal title, and upon the ground of her equitable title ask the aid of a court of equity. She can turn the defendants out of possession only upon the strength of the legal title which she must first acquire. *Having done this a court of law is the proper forum in which to bring her suit.*"

Fussel vs. Gregg, 113 U. S. 558.

In another case it was said:

"The fatal objection to the suit is that it is in fact an attempt by the party claiming the legal title to use a bill in equity, in the nature of a bill of inter-pleader as an action in ejectment. The record makes this apparent. * * * * *It is clear that an action in ejectment would have afforded appellee a plain and adequate remedy.*"

Killian vs. Ebbinghaus, 110 U.S., 568.

In another case it was said:

"The bill in this case is in substance and legal effect an ejectment bill. The title appears by the bill to be merely legal, and the evidence to support it appears to be from documents accessible to either party, and no particular circumstances are stated showing the necessity of the courts interfering either for preventing suit, or other vexation or for preventing an injustice irremediable at law."

And this court declared in that case that the plaintiff must proceed at law because the defendant had a constitutional right to a trial by jury.

Hipps vs. Babin, 19 How., 271.

To the same effect are the cases of

Parker vs. Manf'g Co., 2 Black, 545.
Grand Chute vs. Winegar, 15 Wall., 373.
Galt vs. Galloway, 4 Pet., 332.

Many other decisions of this court maintaining the same views might be cited, but these will suffice.

VII.

As overturning the settled doctrine of this court, announced in the long line of adjudications above referred to, the learned counsel for appellant cites two cases,

Holland vs. Challen, 110 U. S., 515.
Reynolds vs. Bank, 112 U. S., 405.

It would be strange, indeed, if Holland vs. Challen announced a doctrine in direct opposition to that of Killian vs. Ebbinghaus, found in the same report and quoted from above. And Holland vs. Challen

does not in any manner conflict with that case, or the other decisions of this court. On the contrary, it is expressly stated by the court that the defendant was not in possession of the land in that case. The court said (page 21): "The property in this case, to quiet the title to which the present suit is brought, is described in the bill as *unoccupied, wild, and uncultivated land.* * * *An action for ejectment would not lie as it has no occupant.*"

And on page 25 this court said:

"No adequate relief to the owners of real property against the adverse claims of parties *not in possession*, can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to possession—the actual owner of the fee—is helpless in the matter unless he can resort to a court of equity. * * * Should suit be brought in a federal court under the Nebraska statute *as against a party in possession, there would be force in the objection that a legal title was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking.*"

Holland vs. Chalien, 110 U. S., 21, 24, 25.

This case, then, is against the views urged by appellant and fully sustains the action of the court below.

So as to the other case relied upon by appellant, Reynolds vs. Bank, 112 U. S., 405. That was not a case where the defendant was shown to be in possession of the real estate. The allegation in the bill was:

"That Reynolds, the defendant, *for the purpose of annoying complainant, and casting a cloud upon its title, and delaying it in getting possession claimed*," etc. (Page 406.)

It is no where averred by the bill that Reynolds was in possession.

The bill further set forth that Reynolds,

"Was *asserting* a title paramount to the bank and was *threatening to commit waste*, and was insolvent."

The prayer of the bill was for a decree quieting the title of the bank and enjoining waste by Reynolds. (Page 407.)

The answer did not set forth or claim that Reynolds was in possession. The court found:

"That the material averments of the bill, as amended, were true, except the averment as to waste and threatened waste." (Page 408.)

And thereupon entered a decree quieting plaintiff's title. The opinion in this case states the various objections of the defendant Reynolds to the decree of the court below. These objections were:

1. That the court below should have dismissed the bill on Reynold's motion, because the complainant failed to file a replication in due time. (Page 408.)

2. That the court below, "had no jurisdiction to quiet the title of appellee as against a deed averred by the bill and not denied by the answer to be void on its face." (Page 409.)

3. That the appellee's title was itself doubtful, and the bill for

that reason should have been dismissed. (Page 412.)

4. That the bank had no power to take a conveyance of the land in controversy. (Page 412.)

5. That the bank did not perform a part of its contract relative to the land (Page 413.)

It was no where urged in that case, that the bill could not be maintained because the defendant was in possession. And it is not decided in that case that an ejectment bill can be maintained against a defendant in the actual possession of real estate.

What was decided in this Reynolds case is fairly stated in the opinion by the court below, as follows:

"In Reynolds vs. National Bank, 112 U. S., 405, S. C. 5, Sup. Ct. Rep. 213, it is held that the legislation of the state may be looked to, to ascertain what constitutes a cloud upon a title, and that what is declared to be a cloud by state statute will be removed by a court of the United States sitting in equity, even though, in the absence of the statute, the defect was not such as courts of equity had recognized as casting a cloud upon the title. The facts of the case did not present the question of a speedy and adequate legal remedy."

Whitehead, Trustee, vs. Entwhistle, 27 Fed. Rep., 781.

VIII.

Finally, it is said for appellant:

"Repeatedly cases have been brought by parties not in possession, in the United States Circuit Court at Des Moines to quiet title and remove the cloud caused by patents and certificates of entry, against parties in possession of the property."

"We do not think that less than from one to three hundred decrees have been so entered, which if the court has no jurisdiction in equity are void." (Appellant's argument, page 11.)

If the U. S Circuit Court at Des Moines has entered such decrees in equity, it must be presumed that its jurisdiction has not been questioned by the defendants in possession.

Counsel for appellant is needlessly alarmed by the fear that such decrees are void. It hardly requires a citation of authorities to show that they cannot be collaterally assailed. But it happens that this court in a recent case has expressly so decided.

Mellen vs. Moline Iron Works, 131 U. S., 367.

It is hoped that this decision may soothe the perturbed spirits, and allay the anxiety of counsel for appellant, over a matter which is altogether outside of the record in this cause.

CHAS. A. CLARK,

For Appellees.